(95-1649),

Opinion [Thomas]	Concurrence [Kennedy]	Syllabus	Dissent [Breyer]
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SUPREME COURT OF THE UNITED STATES

Nos. 95-1649 and 95-9075

KANSAS, PETITIONER 95-1649 *v.* LEROY HENDRICKS LEROY HENDRICKS, PETITIONER 95-9075

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 23, 1997]

Justice Thomas delivered the opinion of the Court.

In 1994, Kansas enacted the Sexually Violent Predator Act, which establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely

to engage in "predatory acts of sexual violence." Kan. Stat. Ann. §59-29a01 *et seq.* (1994). The State invoked the Act for the first time to commit Leroy Hendricks, an inmate who had a long history of sexually molesting children, and who was scheduled for release from prison shortly after the Act became law. Hendricks challenged his commitment on, *inter alia,* "substantive" due process, double jeopardy, and *ex post-facto* grounds. The Kansas Supreme Court invalidated the Act, holding that its pre-commitment condition of a "mental abnormality" did not satisfy what the court perceived to be the "substantive" due process requirement that involuntary civil commitment must be

predicated on a finding of "mental illness." *In re Hendricks*, 259 Kan. 246, 261, 912 P. 2d 129, 138 (1996). The State of Kansas petitioned for certiorari. Hendricks subsequently filed a cross petition in which he reasserted his federal double jeopardy and *ex post-facto* claims. We granted certiorari on both the petition and the cross petition, 518 U. S. __ (1996), and now reverse the judgment below.

The Kansas Legislature enacted the Sexually Violent Predator Act (Act) in 1994 to grapple with the problem of managing repeat sexual offenders. [n.1] Although Kansas already had a statute addressing the involuntary commitment of those defined as "mentally ill," the legislature determined that existing civil commitment procedures were inadequate to confront the risks presented by "sexually violent predators." In the Act's preamble, the legislature explained:

> "[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute] . . . . In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute]." Kan. Stat. Ann. §59-29a01 (1994).

As a result, the Legislature found it necessary to establish "a civil commitment procedure for the long term care and treatment of the sexually violent predator." *Ibid.* The Act defined a "sexually violent predator" as:

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." §59-29a02(a).

A "mental abnormality" was defined, in turn, as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." §59-29a02(b).

As originally structured, the Act's civil commitment procedures pertained to: (1) a presently confined person who, like Hendricks, "has been convicted of a sexually violent offense" and is scheduled for release; (2) a person who has been "charged with a sexually violent offense" but has been found incompetent to stand trial; (3) a person who has been found "not guilty by reason of insanity of a sexually violent offense"; and (4) a person found "not guilty" of a sexually violent offense because of a mental disease or defect. § 59-29a03(a), §22-3221 (1995).

The initial version of the Act, as applied to a currently confined person such as Hendricks, was designed to initiate a specific series of procedures. The custodial agency was required to notify the local prosecutor 60 days before the anticipated release of a person who might have met the Act's criteria. §59-29a03. The prosecutor was then obligated, within 45 days, to decide whether to file a petition in state court seeking the person's involuntary commitment. §59-29a04. If such a petition were filed, the court was to determine whether "probable cause" existed to support a finding that the person was a "sexually violent predator" and thus eligible for civil commitment. Upon such a determination, transfer of the individual to a secure facility for professional evaluation would occur. §59-29a05. After that evaluation, a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator. If that determination were made, the person would then be transferred to the custody of the Secretary of Social and Rehabilitation Services (Secretary) for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." §59-29a07(a).

In addition to placing the burden of proof upon the State, the Act afforded the individual a number of other procedural safeguards. In the case of an indigent person, the State was required to provide, at public expense, the assistance of counsel and an examination by mental health care professionals. §59-29a06. The individual also received the right to present and cross examine witnesses, and the

opportunity to review documentary evidence presented by the State. §59-29a07.

Once an individual was confined, the Act required that "[t]he involuntary detention or commitment . . . shall conform to constitutional requirements for care and treatment." §59-29a09. Confined persons were afforded three different avenues of review: First, the committing court was obligated to conduct an annual review to determine whether continued detention was warranted. §59-29a08. Second, the Secretary was permitted, at any time, to decide that the confined individual's condition had so changed that release was appropriate, and could then authorize the person to petition for release. §59-29a10. Finally, even without the Secretary's permission, the confined person could at any time file a release petition. §59-29a11. If the court found that the State could no longer satisfy its burden under the initial commitment standard, the individual would be freed from confinement.

In 1984, Hendricks was convicted of taking "indecent liberties" with two 13-year old boys. After serving nearly 10 years of his sentence, he was slated for release to a halfway house. Shortly before his scheduled release, however, the State filed a petition in state court seeking Hendricks' civil confinement as a sexually violent predator. On August 19, 1994, Hendricks appeared before the court with counsel and moved to dismiss the petition on the grounds that the Act violated various federal constitutional provisions. Although the court reserved ruling on the Act's constitutionality, it concluded that there was probable cause to support a finding that Hendricks was a sexually violent predator, and therefore ordered that he be evaluated at the Larned State Security Hospital.

Hendricks subsequently requested a jury trial to determine whether he qualified as a sexually violent predator. During that trial, Hendricks' own testimony revealed a chilling history of repeated child sexual molestation and abuse, beginning in 1955 when he exposed his genitals to two young girls. At that time, he pleaded guilty to indecent exposure. Then, in 1957, he was convicted of lewdness involving a young girl and received a brief jail sentence. In 1960, he molested two young boys while he worked for a carnival. After serving two years in prison for that offense, he was paroled, only to be rearrested for molesting a 7-year old girl. Attempts were made to treat him for his sexual deviance, and in 1965 he was considered "safe to be at large," and was discharged from a state psychiatric hospital. App. 139-144.

Shortly thereafter, however, Hendricks sexually assaulted another young boy and girl--he performed oral sex on the 8-year old girl and fondled the 11-year old boy. He was again imprisoned in 1967, but refused to participate in a sex offender treatment program, and thus remained incarcerated until his parole in 1972. Diagnosed as a pedophile, Hendricks entered into, but then abandoned, a treatment program. He testified that despite having received professional help for his pedophilia, he continued to harbor sexual desires for children. Indeed, soon after his 1972 parole, Hendricks

began to abuse his own stepdaughter and stepson. He forced the children to engage in sexual activity with him over a period of approximately four years. Then, as noted above, Hendricks was convicted of "taking indecent liberties" with two adolescent boys after he attempted to fondle them. As a result of that conviction, he was once again imprisoned, and was serving that sentence when he reached his conditional release date in September 1994.

Hendricks admitted that he had repeatedly abused children whenever he was not confined. He explained that when he "get[s] stressed out," he "can't control the urge" to molest children. *Id.*, 172. Although Hendricks recognized that his behavior harms children, and he hoped he would not sexually molest children again, he stated that the only sure way he could keep from sexually abusing children in the future was "to die." *Id.*, at 190. Hendricks readily agreed with the state physician's diagnosis that he suffers from pedophilia and that he is not cured of the condition; indeed, he told the physician that "treatment is bull----." *Id.*, at 153, 190. [n.2] The jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. The trial court subsequently determined, as a matter of state law, that pedophilia qualifies as a "mental abnormality" as defined by the Act, and thus ordered Hendricks committed to the Secretary's custody.

Hendricks appealed, claiming, among other things, that application of the Act to him violated the Federal Constitution's Due Process, Double Jeopardy, and *ExPost Facto* Clauses. The Kansas Supreme Court accepted Hendricks' due process claim. *In re Hendricks*, 259 Kan., at 261, 912 P. 2d, at 138. The court declared that in order to commit a person involuntarily in a civil proceeding, a State is required by "substantive" due process to prove by clear and convincing evidence that the person is both (1) mentally ill, and (2) a danger to himself or to others. *Id.*, at 259, 912 P. 2d, at 137. The court then determined that the Act's definition of "mental abnormality" did not satisfy what it perceived to be this Court's "mental illness" requirement in the civil commitment context. As a result, the court held that "the Act violates Hendricks' substantive due process rights." *Id.*, at 261, 912 P. 2d, at 138.

The majority did not address Hendricks' *ex post-facto* or double jeopardy claims. The dissent, however, considered each of Hendricks' constitutional arguments and rejected them. *Id.*, at 264-294, 912 P. 2d, 140-156 (Larson, J., dissenting).

Kansas argues that the Act's definition of "mental abnormality" satisfies "substantive" due process requirements. We agree. Although freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992), that liberty interest is not absolute. The Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context:

> "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Jacobson* v. *Massachusetts,* 197 U.S. 11, 26 (1905).

Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. See, *e.g.*, 1788 N. Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the "furiously mad"); see also A. Deutsch, The Mentally Ill in America (1949) (tracing history of civil commitment in the 18th and 19th centuries); G. Grob, Mental Institutions in America: Social Policy to 1875 (1973) (discussing colonial and early American civil commitment statutes). We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. See *Foucha, supra*, at 80; *Addington* v. *Texas,* 441 U.S. 418, 426-427 (1979). It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty. Cf. *id.*, at 426.

The challenged Act unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement. Commitment proceedings can be initiated only when a person "has been convicted of or charged with a sexually violent offense," and "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Kan. Stat. Ann. §59-29a02(a) (1994). The statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated. As we have recognized, "[p]revious instances of violent behavior are an important indicator of future violent tendencies." *Heller* v. *Doe,* 509 U.S. 312, 323 (1993); see also *Schall* v. *Martin,* 467 U.S. 253, 278 (1984) (explaining that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct"). A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a "mental illness" or "mental abnormality." See, *e.g., Heller, supra*, 314-315 (Kentucky statute permitting commitment of "mentally retarded" or "mentally ill" and dangerous individual); *Allen* v. *Illinois,* 478 U.S. 364, 366 (1986) (Illinois statute permitting commitment of "mentally ill" and dangerous individual); *Minnesota ex rel. Pearson* v. *Probate Court of Ramsey Cty.,* 309 U.S. 270, 271-272 (1940) (Minnesota statute permitting commitment of dangerous

individual with "psychopathic personality"). These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior. Kan. Stat. Ann. §59-29a02(b) (1994). The precommitment requirement of a "mental abnormality" or "personality disorder" is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.

Hendricks nonetheless argues that our earlier cases dictate a finding of "mental illness" as a prerequisite for civil commitment, citing *Foucha,* and *Addington*. He then asserts that a "mental abnormality" is *not* equivalent to a "mental illness" because it is a term coined by the Kansas Legislature, rather than by the psychiatric community. Contrary to Hendricks' assertion, the term "mental illness" is devoid of any talismanic significance. Not only do "psychiatrists disagree widely and frequently on what constitutes mental illness," *Ake* v. *Oklahoma,* 470 U.S. 68, 81 (1985), but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement. See, *e.g., Addington*, 441 U. S., at 425-426 (using the terms "emotionally disturbed" and "mentally ill"); *Jackson,* 406 U. S., at 732, 737 (using the terms "incompetency" and "insanity"); cf. *Foucha*, 504 U. S., at 88 (O'Connor, J., concurring in part and concurring in judgment) (acknowledging State's authority to commit a person when there is "some medical justification for doing so").

Indeed, we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones* v. *United States,* 463 U.S. 354, 365, n. 13 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. See, *e.g.*, Gerard, The Usefulness of the Medical Model to the Legal System, 39 Rutgers L. Rev. 377, 391-394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxiii, xxvii (4th ed. 1994) .

To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable

criteria and Hendricks' condition doubtless satisfies those criteria. The mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder. See, *e.g.*, *id.*, at 524-525, 527-528; 1 American Psychiatric Association, Treatments of Psychiatric Disorders, 617-633 (1989); Abel & Rouleau, Male Sex Offenders, in Handbook of Outpatient Treatment of Adults 271 (M. Thase, B. Edelstein, & M. Hersen, eds. 1990). [n.3] Hendricks even conceded that, when he becomes "stressed out," he cannot "control the urge" to molest children. App. 172. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt

with exclusively through criminal proceedings. Hendricks' diagnosis as a pedophile, which qualifies as a "mental abnormality" under the Act, thus plainly suffices for due process purposes.

We granted Hendricks' cross petition to determine whether the Act violates the Constitution's double jeopardy prohibition or its ban on *ex post-facto* lawmaking. The thrust of Hendricks' argument is that the Act establishes criminal proceedings; hence confinement under it necessarily constitutes punishment. He contends that where, as here, newly enacted "punishment" is predicated upon past conduct for which he has already been convicted and forced to serve a prison sentence, the Constitution's Double Jeopardy and *Ex Post-Facto* Clauses are violated. We are unpersuaded by Hendricks' argument that Kansas has established criminal proceedings.

The categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." *Allen,* 478 U. S., at 368. We must initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislature's stated intent. Here, Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code, as well as its description of the Act as creating a "*civil commitment procedure*." Kan. Stat. Ann., Article 29 (1994) ("Care and Treatment for Mentally Ill Persons"), §59-29a01 (emphasis added). Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.

Although we recognize that a "civil label is not always dispositive," *Allen, supra*, at 369, we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." *United States* v. *Ward,* 448 U.S. 242, 248-249 (1980). In those limited circumstances, we will consider the statute to have established criminal proceedings for constitutional purposes. Hendricks, however, has failed to satisfy this heavy burden.

As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness. We have previously concluded that an Illinois statute was nonpunitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was "received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." *Allen*, *supra*, at 371. In addition, the Kansas Act does not make a criminal conviction a prerequisite for commitment--persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act. See Kan. Stat. Ann. §59-29a03(a) (1994). An absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed. Thus, the fact that the Act may be "tied to criminal activity" is "insufficient to render the statut[e] punitive." *United States* v. *Ursery*, 518 U. S. __ (1996) (slip op., at 24).

Moreover, unlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator; instead, the commitment determination is made based on a "mental abnormality" or "personality disorder" rather than on one's criminal intent. The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168 (1963). The absence of such a requirement here is evidence that confinement under the statute is not intended to be retributive.

Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. App. 50-56, 59-60. Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being "punished."

Although the civil commitment scheme at issue here does involve an affirmative restraint, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States* v. *Salerno*, 481 U.S. 739, 746 (1987). The State may take measures to restrict the freedom of the

dangerously mentally ill. This is a legitimate non punitive governmental objective and has been historically so regarded. Cf. *id.,* at 747. The Court has, in fact, cited the confinement of "mentally unstable individuals who present a danger to the public" as one classic example of nonpunitive detention. *Id.,* at 748-749. If detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.

Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. Cf. *Jones,* 463 U. S., at 368 (noting with approval that "because it is impossible to predict how long it will take for any given individual to recover [from insanity]--or indeed whether he will ever recover--Congress has chosen . . . to leave the length of commitment indeterminate, subject to periodic review of the patients's suitability for release"). If, at any time, the confined person is adjudged "safe to be at large," he is statutorily entitled to immediate release. Kan. Stat. Ann. §59-29a07 (1994).

Furthermore, commitment under the Act is only *potentially* indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. §59-29a08. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement. *Ibid.* This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.

Hendricks next contends that the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings here criminal rather than civil. In *Allen,* we confronted a similar argument. There, the petitioner "place[d] great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials" to argue that the proceedings were civil in name only. 478 U. S., at 371. We rejected that argument, however, explaining that the State's decision "to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions." *Id.,* at 372. The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution.

Finally, Hendricks argues that the Act is necessarily punitive because it fails to offer any legitimate "treatment." Without such treatment, Hendricks asserts, confinement under the Act amounts to little more than disguised punishment. Hendricks' argument assumes that treatment for his condition is available, but that the State has failed (or refused) to provide it. The Kansas Supreme Court, however, apparently rejected this assumption, explaining:

> "It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under [the existing Kansas involuntary commitment statute]. If there is nothing to treat under [that statute], then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous." 259 Kan., at 258, 912 P. 2d, at 136.

It is possible to read this passage as a determination that Hendricks' condition was *untreatable* under the existing Kansas civil commitment statute, and thus the Act's sole purpose was incapacitation. Absent a treatable mental illness, the Kansas court concluded, Hendricks could not be detained against his will.

Accepting the Kansas court's apparent determination that treatment is not possible for this category of individuals does not obligate us to adopt its legal conclusions. We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law. See *Allen, supra*, at 373; *Salerno,* 481 U. S., at 748-749. Accordingly, the Kansas court's determination that the Act's "overriding concern" was the continued "segregation of sexually violent offenders" is consistent with our conclusion that the Act establishes civil proceedings, 259 Kan., at 258, 912 P. 2d, at 136, especially when that concern is coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible. While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, see *Allen*, *supra*, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Accord *Compagnie Francaise de Navigation a Vapeur* v. *Louisiana Bd. of Health,* 186 U.S. 380 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases). Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for

their afflictions. Cf. *Greenwood* v. *United States,* 350 U.S. 366, 375 (1956) ("The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner"); *O'Connor* v. *Donaldson,* 422 U.S. 563, 584 (1975) (Burger, C. J., concurring) ("[I]t remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of `cure' are generally low").

Alternatively, the Kansas Supreme Court's opinion can be read to conclude that Hendricks' condition is treatable, but that treatment was not the State's "overriding concern," and that no treatment was being provided (at least at the time Hendricks was committed). 259 Kan., at 258, 912 P. 2d, at 136. See also *ibid.* ("It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment"). Even if we accept this determination that the provision of treatment was not the Kansas Legislature's "overriding" or "primary" purpose in passing the Act, this does not rule out the possibility that an ancillary purpose of the Act was to provide treatment, and it does not require us to conclude that the Act is punitive. Indeed, critical language in the Act itself demonstrates that the Secretary of Social and Rehabilitation Services, under whose custody sexually violent predators are committed, has an obligation to provide treatment to individuals like Hendricks. §59-29a07(a) ("If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for *control, care and treatment* until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large" (emphasis added)). Other of the Act's sections echo this obligation to provide treatment for committed persons. See, *e.g.*, §59-29a01 (establishing civil commitment procedure "for the long term care and treatment of the sexually violent predator"); §59-29a09 (requiring the confinement to "conform to constitutional requirements for care and treatment"). Thus, as in *Allen*, "the State has a statutory obligation to provide `care and treatment for [persons adjudged sexually dangerous] designed to effect recovery,'" 478 U. S., at 369 (quoting Ill. Rev. Stat., ch. 38, ¶ 105-8 (1985)), and we may therefore conclude that "the State has . . . provided for the treatment of those it commits." 478 U. S., at 370.

Although the treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the Act. That the State did not have all of its treatment procedures in place is thus not surprising. What is significant, however, is that Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals. [n.4] And, before this Court, Kansas declared "[a]bsolutely" that persons committed under the Act are now receiving in the neighborhood of "31.5 hours of treatment per week." Tr. of Oral Arg. 14-15, 16. [n.5]

Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post-facto* claims.

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition to prevent the State from "punishing twice, or attempting a second time to punish criminally, for the same offense." *Witte* v. *United States*, 515 U.S. 389, 396 (1995) (emphasis and internal quotation marks omitted). Hendricks argues that, as applied to him, the Act violates double jeopardy principles because his confinement under the Act, imposed after a conviction and a term of incarceration, amounted to both a second prosecution and a second punishment for the same offense. We disagree.

Because we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution. Cf. *Jones* v. *United States*, 463 U.S. 354 (1984) (permitting involuntary civil commitment after verdict of not guilty by reason of insanity). Moreover, as commitment under the Act is not tantamount to "punishment," Hendricks' involuntary detention does not violate the Double Jeopardy Clause, even though that confinement may follow a prison term. Indeed, in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), we expressly recognized that civil commitment could follow the expiration of a prison term without offending double jeopardy principles. We reasoned that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.*, at 111-112. If an individual otherwise meets the requirements for involuntary civil commitment, the State is under no obligation to release that individual simply because the detention would follow a period of incarceration.

Hendricks also argues that even if the Act survives the "multiple punishments" test, it nevertheless fails the "same elements" test of *Blockburger* v. *United States*, 284 U.S. 299 (1932). Under *Blockburger*, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. The *Blockburger* test, however, simply does not apply outside of the successive prosecution context. A proceeding under the Act does not define an "offense," the elements

of which can be compared to the elements of an offense for which the person may previously have been convicted. Nor does the Act make the commission of a specified "offense" the basis for invoking the commitment proceedings. Instead, it uses a prior conviction (or previously charged conduct) for evidentiary purposes to determine whether a person suffers from a "mental abnormality" or "personality disorder" and also poses a threat to the public. Accordingly, we are unpersuaded by Hendricks' novel application of the *Blockburger* test and conclude that the Act does not violate the Double Jeopardy Clause.

Hendricks' *ex post-facto* claim is similarly flawed. The *Ex Post-Facto* Clause, which "`forbids the application of any new punitive measure to a crime already consummated,'" has been interpreted to pertain exclusively to penal statutes. *California Dept. of Corrections* v. *Morales*, 514 U.S. 499, 505 (1995) (quoting *Lindsey* v. *Washington,* 301 U.S. 397, 401 (1937)). As we have previously determined, the Act does not impose punishment; thus, its application does not raise *ex post-facto* concerns. Moreover, the Act clearly does not have retroactive effect. Rather, the Act permits involuntary confinement based upon a determination that the person currently both suffers from a "mental abnormality" or "personality disorder" and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes. Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the *Ex Post-Facto* Clause.

We hold that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible *ex post-facto* lawmaking. Accordingly, the judgment of the Kansas Supreme Court is reversed.

It is so ordered.

Notes

[1] Subsequent to Hendricks' commitment, the Kansas Legislature amended the Act in ways not relevant to this case. See, *e.g.*, Kan. Stat. Ann. §59-29a03 (Supp. 1996) (changing notification period from 60 to 90 days); §59-29a04 (Supp. 1996) (requiring state attorney general to initiate commitment proceedings).

[2] In addition to Hendricks' own testimony, the jury heard from Hendricks' stepdaughter and stepson, who recounted the events surrounding their repeated sexual abuse at Hendricks' hands. App. 194-212. One of the girls to whom Hendricks exposed himself in 1955 testified as well. *Id.*, at 191-194. The State also presented testimony from Lester Lee, a licensed clinical social worker who

specialized in treating male sexual offenders, and Dr. Charles Befort, the chief psychologist at Larned State Hospital. Lee testified that Hendricks had a diagnosis of personality trait disturbance, passive aggressive personality, and pedophilia. *Id.*, at 219-220. Dr. Befort testified that Hendricks suffered from pedophilia and is likely to commit sexual offenses against children in the future if not confined. *Id.*, at 247-248. He further opined that pedophilia qualifies as a "mental abnormality" within the Act's definition of that term. *Id.*, at 263-264. Finally, Hendricks offered testimony from Dr. William S. Logan, a forensic psychiatrist, who stated that it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender. *Id.*, at 328-331.

[3] We recognize, of course, that psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as "mental illnesses." Compare Brief for American Psychiatric Association as Amicus Curiae 26 with Brief for Menninger Foundation et al. as *Amici Curiae* 22-25. These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. Cf. *Jones* v. *United States*, 463 U.S. 354, 365, n. 13 (1983). As we have explained regarding congressional enactments, when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.*, at 370 (internal quotation marks and citation omitted).

[4] We have explained that the States enjoy wide latitude in developing treatment regimens. *Youngberg* v. *Romeo*, 457 U.S. 307, 317 (1982) (observing that the State "has considerable discretion in determining the nature and scope of its responsibilities"). In *Allen*, for example, we concluded that "the State serves its purpose of treating rather than punishing sexually dangerous person by committing them to an institution expressly designed to provide psychiatric care and treatment." 478 U. S., at 373 (emphasis in original omitted). By this measure, Kansas has doubtless satisfied its obligation to provide available treatment.

[5] Indeed, we have been informed that an August 28, 1995, hearing on Hendricks' petition for state habeas corpus relief, the trial court, over admittedly conflicting testimony, ruled that: "[T]he allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment." App. 453-454. Thus, to the extent that treatment is available for Hendricks' condition, the State now appears to be providing it. By furnishing such treatment, the Kansas Legislature has indicated that treatment, if possible, is at least an ancillary goal of the Act, which easily satisfies any test for determining that the Act is not punitive.